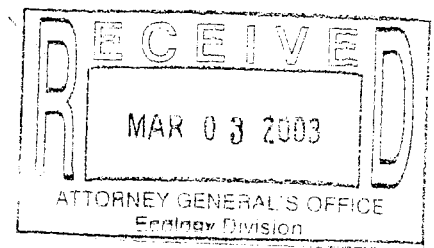


Appendix

E

**Overview of Water Disputes Heard by
The Pollution Control Hearings Board
Prepared by
Kaleen Cottingham and Robyn Bryant
March 2003**



As part of its charge to study judicial and administrative alternatives for resolving water disputes, the members of the Water Dispute Task Force seek to better understand the functions and budget of the Pollution Control Hearings Board, specifically its role in resolving water right disputes. Since the Pollution Control Hearings Board is just one part of the Environmental Hearings Office, in order to extract the costs associated with water disputes, it is important to understand the entirety of the role and budget of the Environmental Hearings Office.

The Environmental Hearings Office houses four quasi-judicial tribunals: 1) the Pollution Control Hearings Board, 2) the Shorelines Hearings Board, 3) the Forest Practices Appeals Board, and 4) the Hydraulic Appeals Board. Each board is independent of the agencies whose decisions are reviewed on appeal. The purpose of these boards is to provide an easily accessible forum for independent, expeditious, and efficient review of various state agency and local government environmental decisions. Additionally, the boards foster a statewide consistent interpretation of Washington's environmental laws in agency decision-making and give aggrieved parties meaningful and enhanced access to justice. Some of the differences (and benefits) of utilizing these boards, as compared to the superior courts, is that appellants do not have to pay a filing fee to challenge the agency decision, cases are resolved in a much shorter period of time, procedural assistance is provided free-of-charge to all parties, and is especially utilized by pro se litigants. Finally, the boards have a respected mediation program whereby mediators are available free-of-charge to help the parties settle or otherwise resolve their disputes.

The decisions of the board are variously indexed and available for use by individuals, attorneys, and others by way of commercial legal research purveyors Westlaw and Lexis, as well as by accessing hard-copy decisions in the Board's office. All decisions since 1998 are available directly from the Environmental Hearings Office's web page. Summaries and Digests of decisions are also available in hard copy and, in some cases, electronically.

The Environmental Hearings Office consists of 9 employees (FTE's). This includes the three full-time members of the Pollution Control Hearings Board, three Administrative Appeals judges, and three administrative staff. The 9 part-time members of the three other boards, and in some cases designated alternates, receive per diem and travel expenses only, unless such expenses are covered by their agency.

The biennial budget for the Environmental Hearings Office for 2001-2003 is \$1,690,707.00, plus approximately \$206,000.00 in pass-through funding from the Department of Ecology to cover one Administrative Judge authorized as a result of the passage of ESHB 1832. This budgetary amount reflects reductions made by OFM as part

of current cost cutting measures. The majority of the expenditures of the Environmental Hearings Office (75%) are associated with salaries and benefits for the 9 FTES. The remainder of the budget covers the cost of travel to remote hearing locations, maintaining the computer system, compensating for attorney general time, along with all other expenses associated with a small state agency (rent, phones, liability premiums, etc.).

The Environmental Hearings Office keeps data on a wide variety of aspects of the cases filed with it. See Appendix 1 for the December 2002 Report, which shows the number of cases filed in December, total numbers filed in 2002, and a running tally of cases filed since 1994. The data is broken down by Board, by type of case, and for a wide variety of actions, such as mediation, settlement, motions, and length of hearing. The Environmental Hearings Office's electronic Case Management System generates this data.

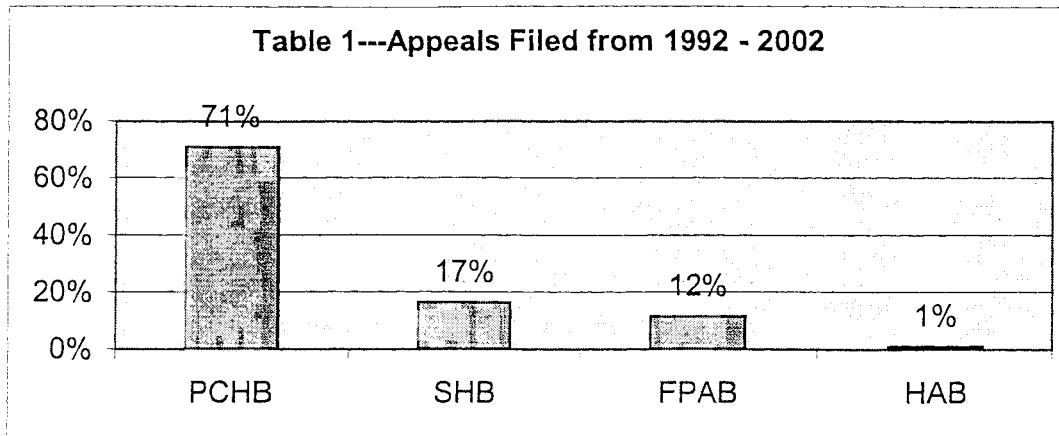
On average, 363 cases are filed with the Environmental Hearings Office each year (records kept on a calendar year basis). Since 1980, the number of cases has been as low as 246 (1995) and as high as 500 (1993). Of those cases, on average, 80 to 85% settle prior to going to hearing. These statistics do not, however, show the complexity of the cases. Later in this document, cases will be broken down by length of hearing, which is the only method the office currently tracks that provides some indication of the complexity of a case.

In order to determine what percentage of the Environmental Hearings Office budget is affiliated with resolving water right disputes, it is important to isolate the amount of work done by the Pollution Control Hearings Board and then subdivide that work by subject areas. This analysis comes from the decade worth of data kept by the Environmental Hearings Office on the various cases filed with the office. Appendix 2 contains the eleven-years of data.

Pollution Control Hearings Board

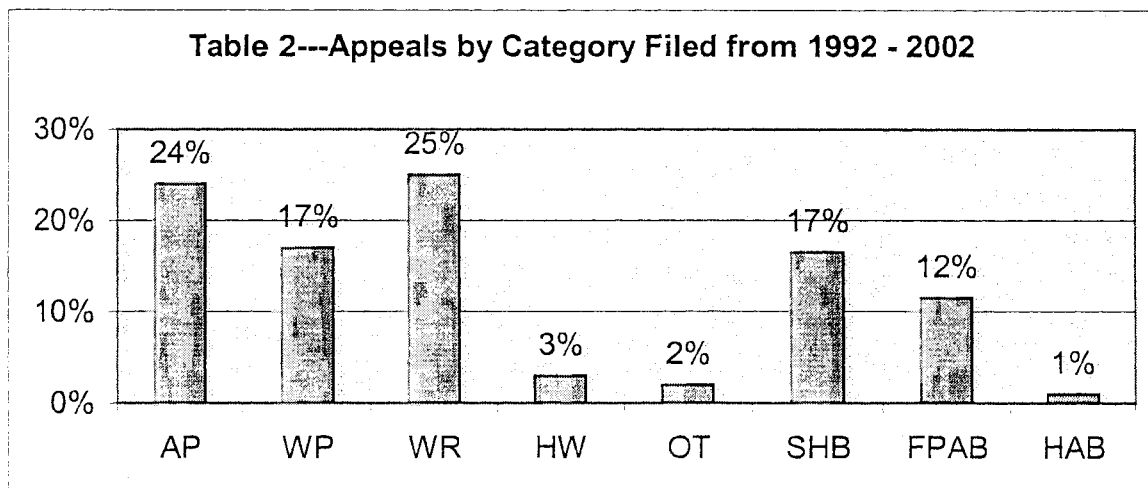
The Pollution Control Hearings Board is comprised of three members appointed by the Governor and confirmed by the Senate. The Pollution Control Hearings Board reviews the decisions of the Department of Ecology. Additionally, this board reviews certain decisions of local conservation districts, air pollution agencies, local health departments, and the Department of Natural Resources.

The Pollution Control Hearings Board receives the majority of cases filed with the Environmental Hearings Office. Table 1 shows the number of cases filed during the eleven-year period from 1992 to 2002, broken down between the four boards. During that time, 3,628 appeals were filed with the Environmental Hearings Office. The Pollution Control Hearings Board accounts for 71%.



PCHB= Pollution Control Hearings Board FPAB= Forest Practices Appeals Board
 SHB= Shorelines Hearings Board HAB= Hydraulics Appeals Board

Over the course of the past eleven years, water right cases have comprised 35% of the cases filed with the Pollution Control Hearings Board and 25% of the cases filed with the Environmental Hearings Office. During the period 1992-2002, 909 water right cases were filed. Over eleven years, this averages to 83 water resources cases filed each year.



AP= Air Pollution HW= Hazardous Waste FPAB= Forest Practice
 WP= Water Pollution OT= Other HAB= Hydraulic Appeal
 WR= Water Right SHB= Shorelines Board

In the above table (table 2), it is important to note that all challenges to Ecology issued §401 certifications are tracked as Water Pollution (WP) cases. In nearly every challenge to a §401 certification in recent years, water right questions have been a major portion of the appeal. Thus, the actual percentage of water right disputes may be higher than 25%.

For purposes of determining an approximate cost of water right cases before the Pollution Control Board, this 25% number will be used as an estimate of expenditures associated with water disputes. This is only an approximation, as none of the Board members or staff track actual hours spent on particular cases.

Using the adjusted 2001-2003 biennial budget for the Environmental Hearings Office as an estimate of expenditures, approximately \$474,177.00 is associated with water disputes (over that two year period). This equates to \$237,088.00 for one year.

Determining the complexity of a case, or the amount of time to resolve a case, depends to a great degree on whether the case goes to hearing (rather than being settled or otherwise dismissed). Other factors include whether dispositive motions are filed or whether the parties request the assignment of a mediator to assist in resolving a dispute. The following charts can help determine the amount of time spent on the various types of cases. You can see that a water dispute is more likely to be resolved on summary judgment motion than other disputes (see table 7). Water disputes take more time for hearings (see table 12). Water right decisions, water pollution decisions, and shoreline decisions are more likely to be appealed to superior court than other decisions (see table 14). And finally, parties to a water dispute are less likely to request the assistance of a mediator (see table 13). All the following charts are based on the same eleven years of data (1992-2002).

Table 3---Agreed Dismissals

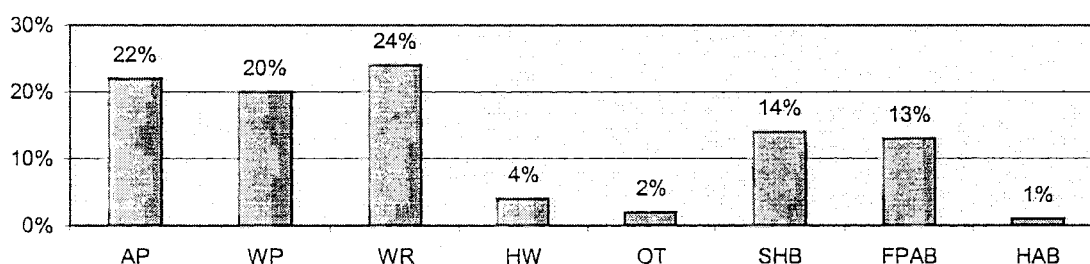


Table 4---Mediated Settlements

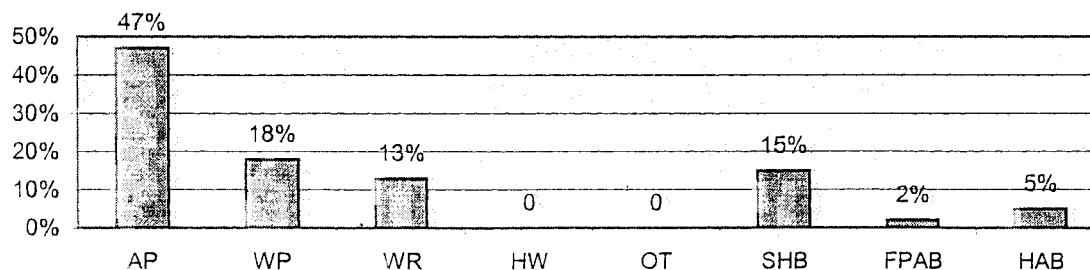


Table 5---Contested Dismissals

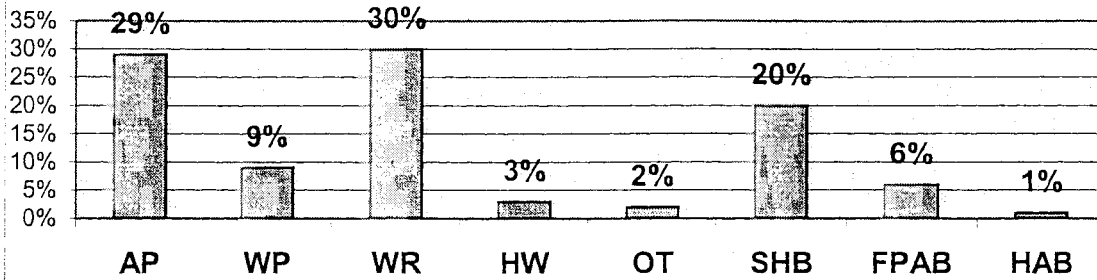


Table 6---Decisions on the Merits

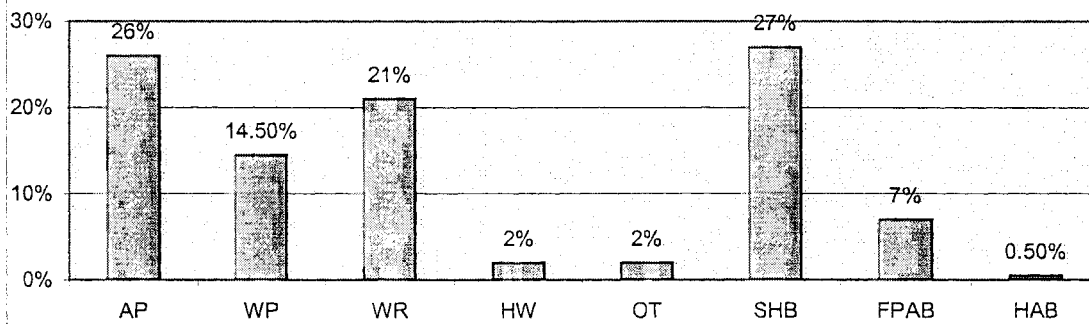


Table 7---Cases Resolved on Summary Judgment

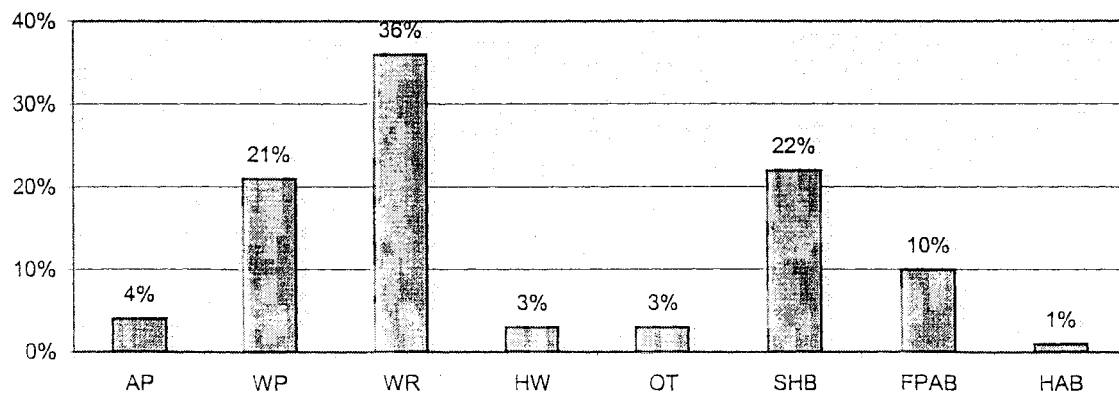


Table 8---Motion Hearings

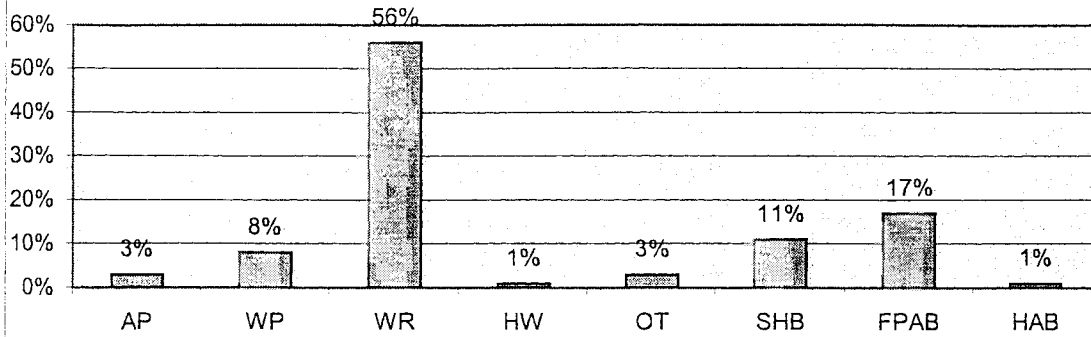


Table 9---1 Day Hearings

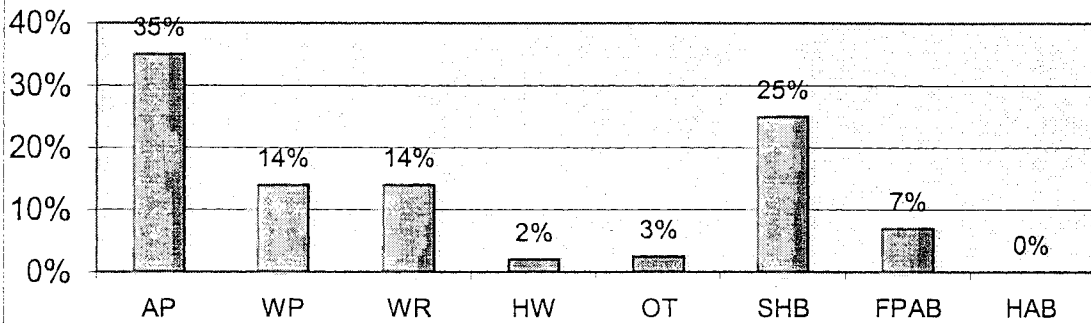


Table 10---2 - 3 Day Hearings

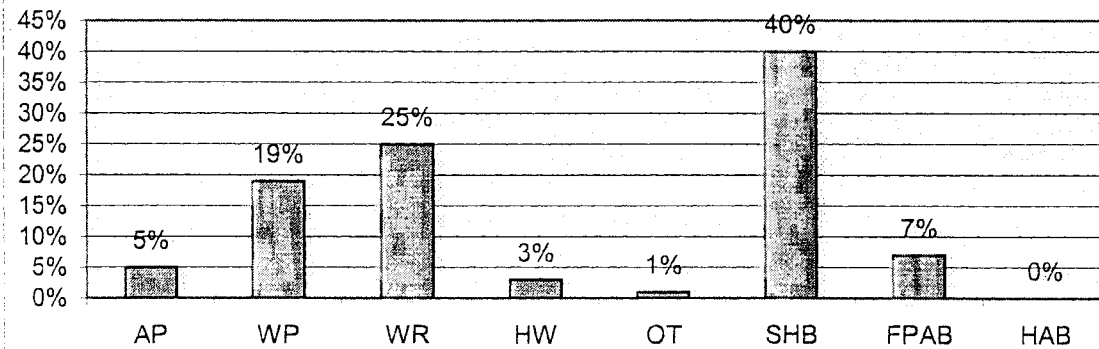


Table 11---4 - 5 Day Hearings

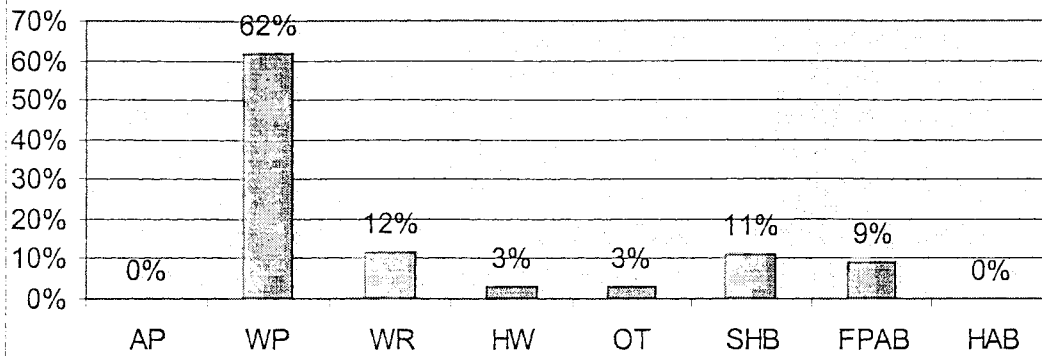


Table 12---6 - 10 Day Hearings

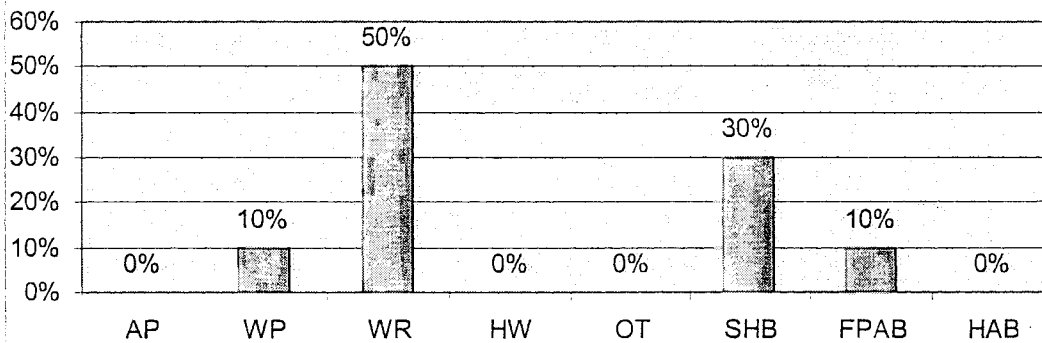
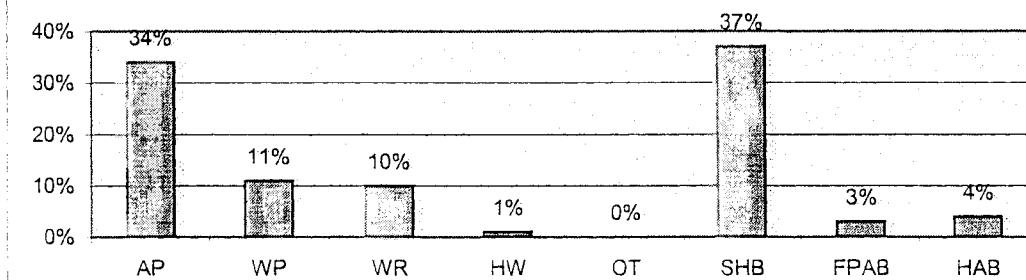
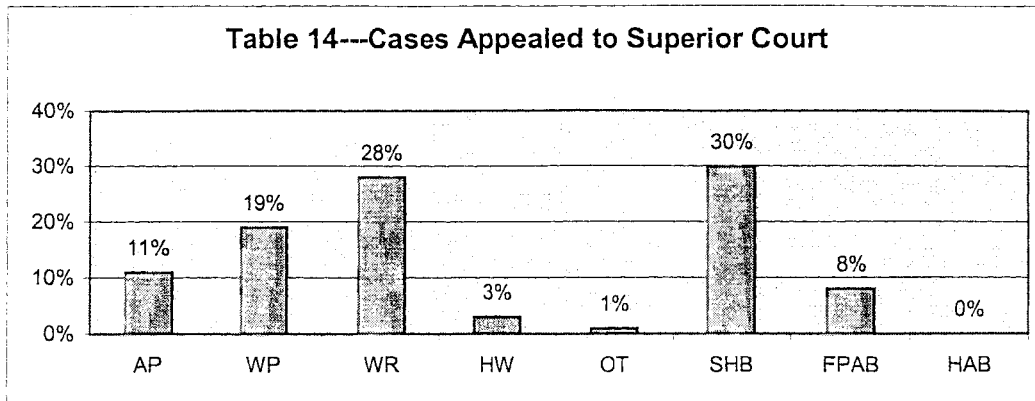


Table 13---Mediations





Relating to water rights, the PCHB has jurisdiction to hear the following types of cases:

- i. **Surface Water Permits and Certificates** (RCW 90.03.250-.290 and Chapters 90.14, 90.22 and 90.54 RCW and Chapters 173-500, -522, -530, -531, -532, -548, -549, -555, -559, -590, and -596 WAC): Any person seeking to divert surface water for most purposes needs a permit. This includes agricultural irrigation, municipal and industrial uses.
- ii. **Ground Water Permits and Certificates** (RCW 90.44.050-.070 and Chapters 90.14, 90.22, and 90.54 RCW and Chapters 173-124, 128, 132, 134, and 136 WAC): Required for all groundwater withdrawals exceeding 5,000 gallons/day.
- iii. **Metering of withdrawals and diversions** (RCW 90.03.360 and 90.44.450): Ecology is given specific authority to impose metering requirements.
- iv. **Amendments to the Claims Registry** (RCW 90.14.065): Any amendment to a claim on file in the state claims registry must be approved by Ecology.
- v. **Family Farm Water Act** (chapter 90.66 RCW): water rights held under this chapter generally follow the Surface Water Code and Ground Water Code, but are subject to some specific provisions of this chapter.
- vi. **Emergency Withdrawals** (RCW 43.83B.400-410): The Department of Ecology may authorize emergency withdrawals of public surface or groundwaters, on a temporary basis, under drought conditions.
- vii. **Reservoir Permits** (RCW 90.03.370): Required in addition to surface water permit when more than ten acre-feet of water is stored.

- viii. **Approval of Dam Plans** (RCW 90.03.350): Plans for all dams designed to store more than ten acre-feet of water must be approved by the Department of Ecology.
- ix. **Change in Place of Use, Purpose of Use or Point of Diversion** (RCW 90.03.380): Any of these changes in a surface water right must be approved by Ecology. More limited changes in water rights are authorized by RCW 90.44.100.
- x. **Cancellation of Permits** (RCW 90.03.320): If a water right is not perfected in accordance with a schedule in the permit, it may be cancelled after notice.
- xi. **Relinquishment of Water Rights** (RCW 90.14.130): The Department of Ecology may issue orders of relinquishment when a water right has been abandoned or not been used for five years without good cause.
- xii. **Administrative Orders** (RCW 43.27A.190-200): The Department of Ecology issues orders for alleged violations of the surface water code, ground water code, and the flood control act.
- xiii. **Civil Penalties** (RCW 90.03.600): \$100 a day for each violation.
- xiv. **Establishment of Minimum Water Flows or Levels** (RCW 90.22 and Chapter 173-30 WAC): The Department of Ecology may unilaterally, or at the request of the Departments of Fish and Wildlife, establish minimum flows or levels for streams, lakes or other public waters, to protect wildlife, recreational values, or water quality. When minimum flows are established by administrative regulation, they may be challenged in superior court pursuant to the APA. When included as conditions of permit decisions, they are subject to review by the PCHB.
- xv. **Declaration of Artificially Stored Ground Waters** (RCW 90.44.130 and Chapter 173-136 WAC): The Department of Ecology may designate ground water areas or sub-areas for the administration of withdrawals to limit them to a safe-sustaining yield from the ground water body. Any person may, within 90 days after such designation, file with Ecology a certified declaration it is the owner of artificially stored ground water within such area or sub-area. The Department shall either accept or reject these.
- xiv. **Well Drillers Licensing**
 - A. **General** (RCW 18.104 RCW and Chapters 173-160 and 162 WAC): All Department of Ecology orders under this chapter may be

appealed to the PCHB. These include cease and desist orders and license revocations.

- B. Penalties** (RCW 18.104.155): For water well construction violations: \$100-\$500 for minor violations, \$500-\$5,000 for serious violations, and \$5,000-\$10,000 for major violations.

2002 Appeals Filed											Running Totals									
2002	AP	WP	WR	HW	OT	S. Total	SHB	FPAB	HAB	Total	2002	2001	2000	1999	1998	1997	1996	1995	1994	
January	12	4	1	0	0	17	2	2	0	21	21	8	17	16	21	24	53	16	32	
February	6	5	4	1	0	16	2	1	0	19	40	20	32	33	36	44	164	35	51	
March	5	0	10	1	0	16	3	3	0	22	62	48	52	52	60	63	203	56	82	
April	1	4	6	1	0	12	2	1	0	15	77	67	70	68	91	88	229	80	113	
May	4	6	6	0	0	16	2	2	0	20	97	100	94	103	116	114	249	96	143	
June	4	11	1	0	0	16	3	1	1	21	118	126	120	132	151	140	273	116	179	
July	7	6	14	0	0	27	0	1	0	28	146	155	147	159	190	171	292	141	232	
August	11	6	6	1	0	24	3	5	0	32	178	177	190	182	282	184	314	162	283	
September	13	7	5	0	0	25	2	2	1	30	208	209	214	209	313	208	331	191	330	
October	13	10	6	1	0	30	4	3	0	37	245	236	229	233	348	236	359	209	365	
November	7	3	4	1	0	15	3	4	0	22	267	250	241	255	367	260	379	232	375	
December	7	1	4	1	1	14	5	2	0	21	288	261	262	273	381	282	398	246	402	
TOTAL	90	63	67	7	1	226	31	27	2	288										
December																				
MEDIATION																				
Active Mediation	19	3	0	1	0	23	2	2	0	27										
ACTIVE CASES																				
Appeal 11/30/02	44	43	70	1	0	158	21	16	1	196										
Appeals Filed	7	1	4	1	1	14	5	2	0	21										
Appeals Closed	0	9	10	0	0	19	6	2	0	27										
Appeal 12/31/02	51	35	64	2	1	153	20	16	1	190										
CUMULATIVE TOTAL																				
Cases Filed	3525	1311	1960	235	463	7494	1734	520	40	9768										
Cases Closed	3474	1276	1896	233	462	7341	1714	504	39	9598										
DISPOSITIVE ORDERS ISSUED																				
DISPOSITIVE																				
Agreed Dismissals	0	5	9	0	0	14	4	2	0	20										
Mediated Settlements	0	0	0	0	0	0	0	0	0	0										
Contested Dismissals	0	0	0	0	0	0	0	0	0	0										
Decisions on Merits	0	1	0	0	0	1	0	0	0	1										
Summary Jgmt.	0	3	1	0	0	4	2	0	0	6										
TOTALS	0	9	10	0	0	19	6	2	0	27										
NON-DISPOSITIVE ORDERS ISSUED																				
NON-DISPOSITIVE																				
Pre-Hearing	1	1	10	1	0	13	2	1	0	16										
Consolidation/Join	33	0	0	0	0	33	2	0	0	35										
Intervention	0	0	0	0	0	0	2	0	1	3										
Stay Motion/Orders	0	2	0	0	0	2	0	0	0	2										
Misc. Orders	2	1	0	0	0	3	1	1	0	5										
TOTALS	36	4	10	1	0	51	7	2	1	61										
Orders Issued in Dec.											88									
TOTAL ORDERS ISSUED TO DATE IN 2002:											925									
ACTIVITIES																				
Hearings:																				
1 Day			2	1		3				3										
2-3 Days						0				0										
4-5 Days						0				0										
6-10 Days						0				0										
Motion Hearings						0		2		2										
Conferences	1	3	9			13	2	3		18										
Mediation						0				0										
*Procedural Assistance		1	1			2	1	1		4										
Site Visits						0				0										
Superior Court Appeals						0				0										
Backlog based on last year's average production:						5 3/4 Mo.														
Percent of cases disposed of without going to hearing:						36%														
Average time in PCHB appeals disposed of by Board hearing:						5 Mo.		Based on number of cases closed												
Average time in SHB appeals disposed of by Board hearings:						3.5 Mo.		in last three months)												

HISTORICAL Total Cases Filed						
YEAR	PCHB	SHB	FPAB	HAB	Total	
1970	42				42	
1971	36	5			41	
1972	173	44			217	
1973	243	72			315	
1974	278	61			339	
1975	185	29	3		217	
1976	175	39			214	
1977	189	41			230	
1978	269	51	2		322	
1979	222	57	7		286	
1980	235	49	1		285	
1981	210	51	2		263	
1982	212	54			266	
1983	219	54			273	
1984	343	64	1		408	
1985	267	41	5		313	
1986	233	62	2		297	
1987	240	53	7		300	
1988	194	61	7		262	
1989	168	76	22	1	267	
1990	239	93	27	3	362	
1991	271	82	21	2	376	
1992	241	58	32	4	335	
1993	320	87	89	4	500	
1994	283	76	41	2	402	
1995	146	66	34	0	246	
1996	295	58	43	2	398	
1997	198	49	33	2	282	
1998	278	66	37	0	381	
1999	205	39	22	7	273	
2000	189	37	29	7	262	
2001	195	33	29	4	261	
2002	228	31	27	2	288	

*Total time spent on procedural assistance: 2.3 hours

Report for December, 2002

HISTORICAL Total Cases Filed						
YEAR	PCHB	SHB	FPAB	HAB	Total	
1970	42				42	
1971	36	5			41	
1972	173	44			217	
1973	243	72			315	
1974	278	61			339	
1975	185	29	3		217	
1976	175	39			214	
1977	189	41			230	
1978	269	51	2		322	
1979	222	57	7		286	
1980	235	49	1		285	
1981	210	51	2		263	
1982	212	54			266	
1983	219	54			273	
1984	343	64	1		408	
1985	267	41	5		313	
1986	233	62	2		297	
1987	240	53	7		300	
1988	194	61	7		262	
1989	168	76	22	1	267	
1990	239	93	27	3	362	
1991	271	82	21	2	376	
1992	241	58	32	4	335	
1993	320	87	89	4	500	
1994	283	76	41	2	402	
1995	146	66	34	0	246	
1996	295	58	43	2	398	
1997	198	49	33	2	282	
1998	278	66	37	0	381	
1999	205	39	22	7	273	
2000	189	37	29	7	262	
2001	195	33	29	4	261	
2002	228	31	27	2	288	

*Total time spent on procedural assistance: 2.3 hours

Report for December, 2002

ENVIRONMENTAL HEARINGS OFFICE
1992-2002

Appendix 2

Appeals Filed by All Boards

PCHB									
YEARS	AP	WP	WR	HW	OT	SHB	FPAB	HAB	TOTALS
1992	87	50	67	23	14	58	32	4	335
1993	138	39	122	13	8	87	89	4	500
1994	94	77	102	7	3	76	41	2	402
1995	66	45	30	2	3	66	34	0	246
1996	58	44	175	3	15	58	43	2	398
1997	68	64	51	11	4	49	33	2	282
1998	65	56	138	10	9	66	37	0	381
1999	81	74	30	11	9	39	22	7	273
2000	69	52	55	11	2	37	29	7	262
2001	60	54	72	9	0	33	29	4	261
2002	90	63	67	7	1	31	27	2	288
TOTALS	876	618	909	107	68	600	416	34	3628
%	24%	17%	25%	3%	2%	16.50%	11.50%	1%	100%